Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

DEBORAH J. THOMAS,
Petitioner,

v.

THE WALT DISNEY COMPANY, WALT DISNEY STUDIOS, DISNEY PRESS, PIXAR ANIMATION STUDIOS, WALT DISNEY FEATURE ANIMATION, WALT DISNEY PICTURES, DISNEY ENTERPRISES, INC., AND DOES 1 THROUGH 100, INCLUSIVE,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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December 28, 2009

QUESTIONS PRESENTED

I. In a copyright infringement action concerning Writer Thomas' exclusive right "to authorize use of her copyrighted work in the preparation of derivative works" (e.g., subsequent screenplays, motion pictures, books) 17 U.S.C. §106 (2) in which copying without authorization is either assumed or conceded (i.e. direct evidence of copyright infringement), is the Judge's application of the lawyer-created indirect evidence 'substantial similarity' test rather than the Congressionally mandated Copyright Act's 'lack of authorization' test an unconstitutional violation of the Separation of Powers doctrine?

II. Did the Ninth Circuit's application of the unprecedented 'hybrid substantial similarity' test for copyright infringement in a Pre-Answer Rule 12(b)(6) Motion to Dismiss in which the Judge took on the fact-determination role of the jury violate Writer Thomas' 7th Amendment Right to a jury trial in a copyright infringement action?

1. If not, did the Ninth Circuit's application of the lawyer-created 'hybrid substantial similarity' test on a *sample* of unverified/unauthenticated works and dismissal of all of Writer Thomas' separate and distinct causes of actions concerning separate and distinct unauthorized derivative works not even in the record violate Writer Thomas' due process, equal opportunity and access to the courts?

2. If not, did the Ninth Circuit err in taking judicial notice of and relying upon documents outside the pleadings, including the testimony and declaration of Disney Defendants' *Attorney*?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Ninth Circuit.

The Petitioner here and the appellant below is Deborah J. Thomas.

The appellees below and the respondents here are: The Walt Disney Company, Walt Disney Studios, Disney Press, Pixar Animation, Walt Disney Feature Animation, Walt Disney Pictures and Disney Enterprises, Inc. ("Disney Defendants").

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II. The Ninth Circuit deprived Writer Thomas due process, equal opportunity and equal access to the courts by granting a Pre-Answer, Pre-discovery Rule 12(b)(6) Motion to Dismiss and making a factual determination based solely on a *sample* of unverified works outside of the Complaint, the only pleading before the court, and dismissing *all* of Writer Thomas' separate causes of action..... 24

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The opinion of the Court of Appeals denying Petitioner's petition for rehearing en banc is reprinted in the Appendix to the Petition ("Pet. App.") at Pet. App. 1a-2a. The opinion of the Court of Appeals is unpublished, and is reprinted in the Pet. App. 3a-3a. The District Court's opinion is reported at *Thomas v. Walt Disney Co.*, No. C-07-4392, 2008 U.S. Dist. LEXIS 14643, at *5 (N.D. Cal. Feb. 14, 2008) and is reprinted at Pet. App. 4a-5a.

JURISDICTION

The Court of Appeals entered its judgment on February 14, 2008 and its order denying the petition for panel rehearing on September 28, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the following provisions of the United States Constitution:

United States Constitution Article I, §1:
"All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

United States Constitution Article I, § 8, cl. 8:
"[All legislative powers herein granted shall be vested in a Congress...] To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

United States Constitution Article V:
"[] nor shall any person be...deprived of life, liberty, or property, without due process of law..."

U.S. Constitution, 7th Amendment :
"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

This case involves provisions of the U.S. Copyright Act, 17 U.S.C. § 101, *et seq.* The pertinent provisions are reproduced in the Appendix at Pet. App. MA-59.

STATEMENT OF THE CASE

This unprecedented Ninth Circuit ruling, affirming a never before applied defense-attorney created indirect evidence 'hybrid substantial similarity' test for copyright infringement presents further conflict and contradictory analysis for copyright infringement actions not only amongst the Circuits but also *within* the Circuits.

The Ninth Circuit affirmed the district court's order granting the Disney Defendants' Pre-Answer, Pre-Trial, and Pre-Discovery Federal Rule of Civil Procedure Rule 12(b)(6) Motion to Dismiss Writer Thomas' Copyright and Idea Complaint without affording Writer Thomas the due process and opportunity to be heard through a jury trial and the opportunity to conduct discovery of the *preparation* (i.e., development) of the unauthorized infringing

derivative works (e.g., subsequent motion picture(s), book(s), tov(s), merchandise and live performances. Pet. App. EA-31 FAC ¶ 38)). The Ninth Circuit sanctioned the conduct of the district court that seeks to thwart Congress's intent to protect creative original authors and encourage creative works through the exercise of Congress' constitutionally mandated exclusive authority to grant to authors/copyright owners certain exclusive rights to and in their works. See U.S. Const. art. I, § 1; U.S. Const. art. 8, § 8 ; 17 U.S.C. § 106 et. seq.

At stake in this case are the fundamental provisions of the U.S. Constitution: (a) the separation of powers provision in which exclusive authority "[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries" is allocated to Congress which exercised such legislative power through the enactment of the Copyright Act, U.S. Const. art. I; U.S. Const. art. 8, § 8, and (b) the constitutionality of the Ninth Circuit's sanctioning of the district court's rulings in this copyright infringement action which usurped such Congressional exclusive authority;(c) due process and equal opportunity and access to the courts; and (d) Writer Thomas' 7th Amendment right to a jury trial in copyright infringement actions. *See* U.S. Const. art. I, U.S. Const. art.8, § 8, U.S. Const. Amend. VII.

Further, at stake in this case are the fundamental provisions of the Copyright Act: the interpretation and application of statutory language that explicitly defines (a) the exclusive rights of the copyright owner; (b) the rights and circumstances

upon which a motion picture derivative work obtains its own copyright; and, (c) infringement of exclusive rights and the copyright owner's redress for infringement, and those provisions that unambiguously spell out that which constitutes an infringing use of the underlying copyrighted pre-existing work (i.e., Writer Thomas' short stories) from which a motion picture derives.

Should Disney Defendants prevail with the Ninth Circuit's sanctioning of the district court's wholesale pre-Answer, pre-discovery, pre-trial dismissal of Writer Thomas entire Copyright Infringement and State Law Idea Claims Complaint, without affording Writer Thomas a jury trial on the key issue of whether or not the Motion Picture derivative is an infringement of Writer Thomas' right to authorize the use of her copyrighted short stories in the preparation (i.e., development) of subsequent derivative works, then the Copyright Act and Congressional exclusive authority over issues of copyright are rendered worthless and the Ninth Circuit would have effectively, and unconstitutionally, legislated judicially.

Such egregious conduct of the Ninth Circuit resulted in decisions concerning "an important federal question in a way that conflicts with relevant decisions of this Court" and "has sanctioned the district court's conduct that so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power." *See, e.g., City of Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981) ("Federal common law is a necessary expedient, and when Congress addresses a question previously governed by a decision rested on

federal common law the need for such an unusual exercise of lawmaking by federal courts disappears.") (internal quotation marks and citations omitted); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) ("While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations...Factual allegations must be enough to raise a right to relief above the speculative level, []on the assumption that all the allegations in the complaint are true (even if doubtful in fact)").

Immediate consideration and review of the Ninth Circuit's unprecedented application of a new defense lawyer-made 'hybrid substantial similarity' test in copyright infringement cases by this Court that would result in a final, concrete answer and guide for all copyright owners.

This case presents this Court with issues that have not been resolved by the Circuits but that should be resolved by this Court concerning: (a) the separate exclusive right concerning a copyright owner's exclusive right to use or authorize the use of their copyrighted work in the *preparation* of derivative works (e.g., the Copyright Act specifically identifies a 'motion picture' as a derivative work, 17 U.S.C. § 103, and (b) the unconstitutionality of applying a defense lawyer-made 'substantial similarity test' where, as here, direct evidence of copying without authorization is governed by the literal words and intent of the Copyright Act.

A. Factual Background

Writer Deborah Thomas, a published poet and photographer, had worked for several years as a Scuba Divemaster and a Tropical Fish Collector in the Florida Keys. In the summer of 2000, inspired by her five year old daughter, Deborah wrote a short story about a Rock Beauty, a type of Angelfish, and his adventures after being captured by a human. At the time Deborah wrote this story in 2000, this idea was unique as it was based on her own experiences of chasing and catching these fish in which Deborah observed them in their own habitat and participated in their interactions with humans.

On or about April 6, 2001 and believing that the Disney Company would be interested in her unique idea gleaned from her personal experiences, Deborah submitted her unique story idea and copyrighted short story "Squisher the Fish" to Disney Defendants in an envelope labeled "Submission." Deborah also included a cover letter indicating her desire to be paid for the sale of her idea and copyrighted work should Disney be interested in her submission after Disney's consideration of her work. Pet. App. G 45a(Writer Thomas' correspondence to Disney).

It is undisputed that Disney opened Deborah's' submission, and after reviewing the submission for over three months, contacted Deborah on June 22, 2001 and returned her submission- pursuant to the Disney policy, purportedly the same policy outlined in a Disney/ABC memo which outlined the procedures for Disney/ABC employees to use upon receipt of submissions so that Disney could

steal ideas and copyrighted work without compensating the original copyright owners. Pet. App JA-56(memo from Disney/ABC legal department); Pet. App. G47a(Disney's correspondence to Writer Thomas regarding her idea and story submission "Squisher the Fish"). On or about April 27, 2004, Deborah applied to the Register of Copyrights for and obtained a Certificate of Registration TXu1-175-008 for her *unpublished* short story "Squisher the Fish." Pet. App. E EA-31AC, Ex. A).

The undisputed facts set forth in the Complaint - and assumed as true on a Rule 12(b)(6) Motion to Dismiss - are that during the three months of Disney's acknowledge possession of Deborah's copyrighted short story "Squisher the Fish", that Disney Defendants copied and adapted Writer Thomas' short story without her authorization and knowledge. As alleged in the Complaint - and assumed to be true and undisputed - the Disney Defendants then during the course of the standard two years of development of a motion picture derivative and without Deborah's knowledge and consent used Deborah's unique idea and copied and used Deborah's copyrighted "Squisher the Fish" as the underlying work upon which the unauthorized subsequent derivative screenplays and motion picture derivatives, eventually entitled "Finding Nemo" were based.

In 2003, Disney Defendants released the motion picture derivative "Finding Nemo" -- about the adventures of a Fish after being captured by humans. "Finding Nemo" has grossed over $325 million dollars (domestically) and is currently the top

15th highest all-time grossing domestic motion picture even six years after initial release. Pet. App. K.

B. Proceedings Below

Writer Thomas filed a complaint for relief under California Business and Profession Code § 17200, et. seq. on May 29, 2007. Pet. App. F36a. The case was removed to The Northern District of California on August 24, 2007. Writer Thomas filed a First Amended Complaint on October 31, 2007. Pet. App. EA-31

Disney Defendants did not file any Answers to the First Amended Complaint, and instead filed a Rule 12 b 6 Motion to Dismiss the First Amended Complaint for Failure to State a Claim along with a Motion for Judicial Notice of various documents that Disney Defendants Defense *Attorney* downloaded from the world-wide web. Pet. App. L94a (docket); Pet. App. H48a (Disney Defendants' *Attorney's* declaration). Also, attached to Defendants' *Attorney's* declaration was the original version of Writer Thomas copyrighted work (although admittedly not the subsequent revised work Disney concedes possessing for over three months), *see* Pet. App. BA-6 FN2(court order), along with a DVD of purportedly one of the unauthorized motion picture derivatives of "Finding Nemo." Not one Defendant submitted any declaration in support of the Motion and did not even verify that it was asserting copyright ownership the their *Attorney's* DVD submission. The District Court granted the Disney Defendants' Motion for Judicial Notice while denying Writer Thomas' request to submit the actual version

of her copyrighted work that Disney Defendants had in possession. Pet. App. D6a.

The District Court held oral argument and improperly relied solely upon the testimony of *Attorneys* for an expert/opinion analysis of substantial similarity. Pet. App IA-47 (Transcript of Hearing). The District Court issued an Order on February 14, 2008 after taking on the role of the jury and making a fact determination through a 'substantial similarity' analysis of only a *sample* of unverified/unauthenticated works and dismissing Writer Thomas' Complaint in its entirety. Pet. App. BA-6 Judgment was entered the same day. Pet. App. CA-27

On July 8, 2009, the Ninth Circuit affirmed the dismissal in an unpublished order that consisted solely of five (5) sentences (excluding case law and quotes from case law) and with no de novo discussion. Pet. App. AA-3a. The Ninth Circuit denied Writer Thomas' Motion for rehearing en banc on September 28, 2009. Pet. App DA-29

REASONS FOR GRANTING THE PETITION

I. The Importance of the Question

This case presents exceedingly important and unprecedented questions of federal law that have not been but should be settled by this Court, and concerning issues that the circuits are in conflict: concerning the constitutionality of the application of defense attorney-created and judicially sanctioned 'substantial similarity' test for infringement of a copyright owner's separate and distinct exclusive

right to 'use and authorize the use of her copyrighted work in the *preparation* of derivative works' , 17 U.S.C. § 106(2), which is in direct conflict with the language and intent of the Copyright Act's unambiguous stated requirement for infringement that requires only a showing that the accused infringer used ' any *portion* of the underlying copyrighted work *without authorization*.' The House Report provides: "[T]o constitute a violation of section 106(2), the infringing work must incorporate a portion of the copyrighted work in some form." H.R. REP. No. 1476,note 149, at 5675.

The core question concerning the lack of uniformity and consistency of the varying and contradictory applications of a test for copyright infringement in which some Federal Circuits are usurping the power of Congress, ignoring the literal plain language of the U.S. Copyright Act, and applying movie-studio defense *attorney*-created 'substantial similarity' tests rather than the U.S. Copyright Act's 'use and lack of authorization' test. 17 U.S.C. §§ 103, 106.

Review is urgently needed not only to resolve the conflicts amongst the circuits, but more importantly to clarify and confirm the standards for the applicability of the Copyright Act's 'lack of authorization' test for an accused copyright infringer's 'unauthorized use of any portion of the copyrighted underlying work" in subsequent infringing derivative works (e.g., motion picture adaptations).

The importance and urgency of an immediate consideration by this U.S. Supreme Court goes

beyond just the ramifications that this ruling and this Court's resolution of these issues would have in the United States. Review and confirmation that the Copyright Act protections are afforded equally to individual writers as they are to corporate billion dollar media companies who exercise their rights as plaintiffs and are afforded due process, will allow the U.S. Federal Judiciary to gain the respect of the worldwide public in light of the corporate criminal white collar crimes - e.g., Google, Inc.'s recent conviction of willful copyright infringement in *France* for the exact conduct the U.S. Courts (S.D.N.Y.) fail to prosecute, Madoff, Dreier scandals - that have contributed to the financial crisis of the United States but also to the loss of all faith in the integrity of the Federal Judiciary.

The Questions presented in this Petition are "questions whose resolution will have immediate importance far beyond the particular facts and the parties involved."

A. This case raises the critically important question of the unconstitutionality of the application of the movie studio defense-attorney created indirect evidence 'substantial similarity' test to determine infringement of the copyright owner's separate and distinct exclusive right "to authorize use of copyrighted work in the *preparation* (development) of derivative works (e.g., motion pictures, books, toys)."

Article 8, cl.8 of the United States Constitution clearly sets forth the separation of powers (executive, judicial, and legislative) and the

exclusive authority granted to Congress with regard to Copyright law: "[All legislative powers herein granted shall be vested in a Congress...] To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

The Copyright Act provides protection for original works of authorship expressed in various media. 17 U.S.C. § 101 et. seq.. The owner of a copyright has the exclusive rights (1) to reproduce the copyrighted work, (2) to prepare derivative works; (3) to distribute copies; (4) to perform publicly a copyrighted work; and, (5) to display publicly a copyrighted work. 17 U.S.C. §106.

The statutory rights of a copyright owner include the exclusive right "to prepare derivative works based upon the copyrighted work." 17 U.S.C. § 106(2). The Copyright Act defines a derivative as those works "**based upon**" an underlying copyrighted work:

> "[a derivative work] is a work based upon one or more pre-existing works,such as a translation, musical arrangement, **dramatization**, fictionalization, **motion picture version**, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or **adapted**. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole,

> represent an original work of authorship, is a "derivative work."(emphasis added). 17 U.S.C. § 106(2).

In her First Amended Complaint, Writer Thomas adequately and clearly set forth a separate cause of action for Disney Defendants' violation of Writer Thomas' exclusive right to use or authorize the use or **adaptation** of her short story "Squisher the Fish" as the underlying works upon which the subsequent unauthorized Disney Defendants' infringing **motion picture** derivative, eventually entitled, "Finding Nemo" were based:

> "38. Through their [Disney Defendants] conduct alleged herein, [Disney] Defendants have infringed Plaintiff's copyright by reproducing, ***adapting***, distributing **and/or** displaying the **movie "Finding Nemo"** and/or making and/or selling **video games, books, and other merchandise based on the movie "Finding Nemo" which embodies Plaintiff's copyrighted material ["Squisher the Fish"]** ***without authorization in violation of Sections 106 and 501 of the Copyright Act, 17 U.S. C. § § 106 and 501."*** (emphasis added).

Pet. App. EA-39 FAC, ¶38.).

A Copyright Owner may bring a claim against a person who infringes any of the plaintiff's exclusive rights in a copyright under § 106 by demonstrating two elements: "(1) ownership of a valid copyright;

and (2) copying of constituent elements of the work that are original." *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). There is no substantial similarity requirement that a copyright owner needs to prove in *every copyright infringement action*.

To the Contrary, the House Report on the derivative right provision stated: "[T]o constitute a violation of section 106(2) [a copyright owner's exclusive right to authorize use of her work in the preparation of derivative works, e.g., motion pictures], the infringing [derivative] work must **incorporate a portion of the copyrighted work in some form.**" H.R. Rep. No. 1476,note 149, at 5675.

"**A portion of the copyrighted work in some form**" in fact clearly contradicts a "substantial similarity" requirement, especially in light of the singular "a" rather than "many" portion[s].

This Ninth Circuit ruling that displaced the Congressional 'lack of authorization' test with a lawyer-created 'substantial similarity' test concerning the violation of the 'derivative right' is in direct conflict with the Sixth Circuit where the Sixth Circuit gave deference to Congress' exclusive authority and held that when a defendant has not disputed copying with reference to the copyright owner's 'derivative right' cause of action, "[n]o substantial similarity or de minimus inquiry should be undertaken at all..." *Bridgeport Music, Inc. v. Dimension Films*, 410 F. 3d 792 (6th Cir. 2005). The Sixth Circuit went further to confirm Congress' statutory (Copyright Act) authority that supersedes

any defense attorney-made substantial similarity test in derivative right copyright infringement actions:

> "**Our analysis begins and largely ends with the applicable statute [Copyright Act].** Why is there no *de minimus* taking or why should substantial similarity not enter the equation. Our first answer to this question is what we have earlier indicated. **We think this result is dictated by the applicable statute [Copyright Act].**" (emphasis added).

Bridgeport Music, Inc. v. Dimension Films, 410 F. 3d 792 (6th Cir. 2005). The Sixth Circuit even expressly directed the defendant corporate entertainment companies that the only place for them to go to change this application of the law protecting the 'derivative right'...is Congress:

"**it is easy enough for the record industry, as they have done in the past, to go back to Congress for a clarification or change in the law...**" *Id.*

II. The Ninth Circuit deprived Writer Thomas due process, equal opportunity and equal access to the courts by granting a Pre-Answer, Pre-discovery Rule 12(b)(6) Motion to Dismiss and making a factual determination based solely on a *sample* of unverified works outside of the Complaint, the only pleading before the court, and dismissing *all* of Writer Thomas' separate causes of action.

The district court not only looked outside the pleadings, failed to apply the admissions of Disney Defendants (through attorneys) but also even refused to accept for consideration Writer Thomas' version of her copyrighted work that Disney Defendants conceded access. Pet. App. G41a.(Writer Thomas Decl. in Oppos).

The Ninth Circuit's Rule 12 (b)(6) Motion to Dismiss for Failure to State a Claim in a copyright infringement lawsuit dismissal based on a factual analysis pursuant to an unprecedented 'hybrid substantial similarity' comparison (skipping access and copying concessions, and failing to consider the *unpublished* nature of Writer Thomas' short story) of unverified/unauthenticated works outside the pleadings, violates long-standing procedures for dismissal motions and contradicts at least the 4th Circuit which holds that Rule 12(b)(6) Motions test the "legal sufficiency of the complaint and not the facts in support of it." *E. Shore Mkts, Inc. v. J.D. Assocs, Ltd. P'Ship*, 213 F. 3rd 175, 180 (4th Cir. 2000).

The Ninth Circuit's application of this unprecedented 'hybrid substantial similarity' test on Rule 12(b)(6) Motion also clearly conflicts with the holdings of this Court that ruled in order to survive a motion to dismiss, the complaint need only provide "a fair notice of what the claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

As shown above, in the very least, Writer Thomas indisputably satisfied the requirements of Federal Rule of Civil Procedure 8 (clearly and plainly

stated claim") and this Court's holding in *Twombly*, supra.

As substantiated above, Writer Thomas, in the very least, clearly stated a claim for the violation of her exclusive 'derivative right.' Because a violation of any one of the exclusive rights is copyright infringement, e.g, one who violates the copyright owner's right to create derivative works is an infringer. 17 U.S.C.S. §501(a). The Ninth Circuit's wholesale pre-answer dismissal of *all* of Writer Thomas' claims based on a *sample* of unverified documents is an unconstitutional deprivation of Writer Thomas's due process right to obtain the privileges granted to her and the redress afforded to her pursuant to the Copyright Act. 17 U.S.C. § 501.

The Ninth Circuit's refusal to submit any opinion with its conclusory five (5) sentence unpublished order affirming the district court's dismissal, Pet. App AA-3 Writer Thomas was deprived repeatedly of due process with this failure of the Ninth Circuit to conduct a *de novo* appellate review.

III. There is a Seventh Amendment Right to a Jury Trial in copyright infringement actions. Writer Thomas' Seventh Amendment Right to a Jury Trial was violated when the district judge took on the fact determination role on a pre-answer, pre-trial Motion to Dismiss for Failure to State a Claim.

The Seventh Amendment "requires that questions of fact in common law actions shall be settled by a jury, and that the court shall not assume

directly or indirectly to take from the jury or to itself such prerogative." U.S. Const. Seventh Amendment.

The Ninth Circuit's unprecedented refusal to allow Writer Thomas to a jury trial on her copyright infringement claims contradicts and conflicts with various other Circuits and the rulings of this Court which conclude that the Seventh Amendment provides a right to a jury trial when the copyright owner endeavors to prove and recover its actual damages as well as statutory damages. *See, e.g., Video Views, Inc. v.Studio 21 Ltd.*,925 F.2d 1010, 1015 (7th Cir. 1991)(right to jury trial exists in copyright infringement action for actual damages); *cass Country Music Co., v. C.H.L.R., Inc.*, No 95-2304 (8th Cir. 1996)(either party in a copyright infringement lawsuit is entitled to a jury trial on demand); *Gnossos Music v. Mitken, Inc.*, 653 F. 2d 117, 119 (4th Cir. 1981)(copyright infringement action analogous to a common law action for tortuous interference with a property right and parties entitled to a jury trial as a result); *Markman v. Westview Instruments, Inc.*, 116 S.Ct. 1384, 1389(1996)(holding patent, and copyright, cases "derive from actions tried at law in the 18th century, and there is no dispute that infringement cases today must be tried to a jury.").

III. Immediate Review is Urgently Needed

There is no doubt that there is a lack of uniformity in the federal circuits concerning allowing an individual copyright plaintiff the right to a jury trial on copyright causes of action and there is no doubt that Writer Thomas was prevented from exercising her basic simple due process rights to

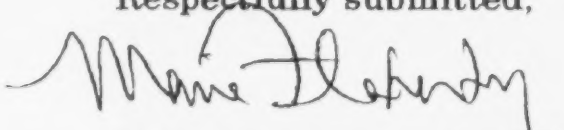
litigate her claims.

This Ninth Circuit case has effectively set precedent that strips individual writer plaintiff in copyright infringement actions of even stepping into the courthouse. A simple comparison of the due process and access to the courts afforded to corporate billion dollar entertainment companies when they appear as plaintiffs in copyright infringement actions further supports the contention that immediate review by this Court is necessary and desperately needed to create uniformity in the Circuits and in copyright cases where the protections and rights pursuant to the U.S. Copyright Act will be granted to all individuals regardless of corporate status.

IV. Conclusion

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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Supreme Court, U.S.
FILED

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No.

In The Supreme Court of The United States

DEBORAH J. THOMAS,

Petitioner,

v.

THE WALT DISNEY COMPANY, WALT DISNEY STUDIOS, DISNEY PRESS, PIXAR ANIMATION STUDIOS, WALT DISNEY FEATURE ANIMATION, WALT DISNEY PICTURES, DISNEY ENTERPRISES, INC., AND DOES 1 THROUGH 100, INCLUSIVE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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U.S. COURT OF APPEALS

DEBORAH J. THOMAS,
Plaintiff - Appellant,

v.

No. 08-15602
D.C. No. 07-CV-4392-CW
MEMORANDUM*

THE WALT DISNEY COMPANY, et al.,
Defendants - Appellees.

Appeal from the United States District Court
for the Northern District of California
Claudia Wilken, District Judge, Presiding

Submitted June 16, 2009**

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*This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

**The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Before: PAEZ, TALLMAN, and N.R. SMITH, Circuit Judges.

Deborah J. Thomas appeals pro se from the district court's judgment dismissing her copyright infringement action. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo, *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 989 (9th Cir. 2009), and affirm.

The district court properly entered judgment for defendants because, as a matter of law, Thomas's literary work was not "substantially similar" to defendants' animated movie. *See Funky Films, Inc. v. Time Warner Entertainment Co., L.P.*, 462 F.3d 1072, 1076 (9th Cir. 2006) ("Absent evidence of direct copying, proof of infringement involves . . . showing[ ] that . . . the two works are substantially similar.") (internal quotation marks omitted); *id.* ("[S]ubstantial similarity may [ ] be decided as a matter of law.") (internal quotation marks omitted). The plot, characters, and mood of the two works were not substantially similar. *See id.* at 1077 ("The substantial-similarity test contains an extrinsic [ ] component. . . . The extrinsic test focuses on articulable similarities between the plot . . . mood . . . characters, and sequence of events in the two works.") (internal brackets and quotation marks omitted).

Contrary to Thomas's contention, the district court properly considered materials whose contents Thomas alleged in her complaint or involved matters subject to judicial notice. *See In re Stac Electronics*

Securities Litigation, 89 F.3d 1399, 1405 n.4 (9th Cir. 1996) ("Documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss.") (internal quotation marks and brackets omitted); *Mack v. South Bay Beer Distribs., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986) ("[O]n a motion to dismiss a court may properly look beyond the complaint to matters of public record and doing so does not convert a Rule 12(b)(6) motion to one for summary judgment.").

The district court properly denied Thomas's request to take judicial notice of materials that were not readily verifiable. *See* Fed. R. Evid. 201(b) (requiring requests for judicial notice to set forth facts that are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned"); *Silver v. Executive Car Leasing Long-Term Disability*, 466 F.3d 727, 732 n.2 (9th Cir. 2006) (affirming the district court's denial of a request for judicial notice where the "items were not sufficiently reliable to be judicially noticeable").

The district court properly dismissed without leave to amend Thomas's state law claim of unfair business practices because amendment would have been futile. *See Zucco Partners*, 552 F.3d at 1007 (affirming denial of leave to amend complaint).

Thomas's remaining contentions lack merit.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA

DEBORAH THOMAS,

Plaintiff,

v.

THE WALT DISNEY COMPANY, WALT DISNEY STUDIOS, DISNEY PRESS, PIXAR ANIMATION STUDIOS, WALT DISNEY FEATURE ANIMATION, WALT DISNEY PICTURES and DISNEY ENTERPRISES, INC.,

Defendants.

No. C-07-4392 CW

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

Defendants The Walt Disney Company, Walt Disney Pictures (also sued as Walt Disney Studios and Walt Disney Feature Animation), Disney Book Group, LLC (sued as Disney Press), Pixar (sued as Pixar Animation Studios), and Disney Enterprises, Inc. move to dismiss the first amended complaint (FAC). Plaintiff Deborah Thomas opposes the motion. The motion was heard on January 31, 2008. Having considered all of the parties' papers and oral argument on the motion, the Court grants Defendants' motion.

BACKGROUND

According to the FAC, during the summer of

2000, Plaintiff created an original literary work titled "Squisher the Fish." FAC ¶ 14. On April 6, 2001, Plaintiff submitted the story to Defendants "for the purpose of selling her work for use as a movie, published book, television show, game or other commercial application." FAC ¶ 18. On June 21, 2001, Defendants returned Plaintiff's story and informed her that it was their business practice not to consider unsolicited outside story submissions. FAC ¶ 23. Plaintiff alleges that during the time Defendants had the story, they copied it and "incorporated it into a movie created, produced, distributed and sold by Defendants entitled 'Finding Nemo.'" FAC ¶ 24.

"Finding Nemo" was first released and shown to the public on May 30, 2003, and Plaintiff first saw the movie on June 6, 2003. FAC ¶¶ 26, 27. Plaintiff alleges that Defendants continued to show "Finding Nemo" domestically and internationally after May 29, 2004 and that sales and rentals of the DVD and videocassette of the movie continued after May 29, 2004. FAC ¶ 28, 30. Further, Plaintiff alleges that "sometime after May 30, 2003, Defendants prepared a video game based on the movie" and sales of that video game continued after May 29, 2004. FAC ¶ 31. Similarly, Defendants "prepared children's books based on the movie" and "made toys and other merchandise based on the story and characters in the movie." FAC ¶¶ 33, 34. Plaintiff alleges that the sales of the books, toys and merchandise continued after May 29, 2004. FAC ¶¶ 33, 34. Finally, Plaintiff alleges that "Defendants have prepared live performances based on the movie" which "continued after May 29,

2004." FAC ¶ 34. Plaintiff now seeks relief on two grounds, copyright infringement under the Copyright Act and unfair competition under California Business & Professions Code § 17200.

DISCUSSION

Under the Federal Rules of Civil Procedure, a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). A plaintiff need not set out in detail the facts upon which it bases its claim; however, the plaintiff must "give the defendant fair notice of what the plaintiff's claim is and the grounds on which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957); *see Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964 (2007). All material allegations in the complaint, "even if doubtful in fact," are assumed to be true, *id.*, and are construed in the light most favorable to the plaintiff. *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986).

When granting a motion to dismiss, the court is generally required to grant the plaintiff leave to amend, even if no request to amend the pleading was made, unless amendment would be futile. *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 246-47 (9th Cir. 1990).

I. Copyright Claim

A. Substantially Similar

Defendants argue that Plaintiff fails to state a claim because "Squisher the Fish" and "Finding Nemo" are not substantially similar. As discussed below, the Court grants Defendants' request for judicial notice of the text of "Squisher the Fish" and the film "Finding Nemo." "There is ample authority for holding that when the copyrighted work and the alleged infringement are both before the court, capable of examination and comparison, non-infringement can be determined on a motion to dismiss." *Christianson v. West Pub. Co.*, 149 F.2d 202, 203 (9th Cir. 1945).[1]

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[1]Both parties have filed requests for judicial notice. Generally, in ruling on a motion to dismiss, a court cannot consider material outside of the complaint. *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994), overruled on other grounds in *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1127 (9th Cir. 2002). However, a court may consider exhibits submitted with the complaint and those documents "whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading." *Id.* at 453-54.

Defendants request that the Court take judicial notice of the copyright deposit for "Squisher the Fish" on file with the United States Copyright Office, the motion picture "Finding Nemo," various newspaper and magazine articles, and a number of press releases published on Pixar's website. While Plaintiff refers to the contents of the movie "Finding Nemo" and the text of "Squisher the Fish" in the complaint, she does not refer to any of the articles or press releases. Therefore, the Court grants Defendants' request for judicial notice of the text of "Squisher the Fish" and the motion picture "Finding Nemo" and denies Defendants' request for judicial notice of the newspaper and magazine articles and of the press releases from the Pixar website. (Docket No. 27).

To determine whether two works are substantially similar, the Court applies a two part test, examining both "extrinsic" and "intrinsic" components of the works. *See Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1442-43 (9th Cir. 1994). Although to establish infringement the works must be substantially similar under both tests, the Court may only consider the extrinsic test because "the intrinsic test, which examines an ordinary person's subjective impressions of the similarities between two works, is exclusively the province of the jury. *Funky Films, Inc. v. Time Warner Entertainment Co., L.P.*, 462 F.3d 1072, 1077 (9th Cir. 2006). The extrinsic test measures objectively, as a matter of law, whether protectable elements of two works are substantially similar in ideas and expression. *See Apple Computer*, 35 F.3d at 1442. If all of the similarities between the works arise from the use of unprotectable ideas, the plaintiff fails to satisfy the extrinsic test. *Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042, 1045 (9th Cir. 1994); *Aliotti v. R. Dakin & Co.*, 831 F.2d 898, 901 (9th Cir. 1987).

The extrinsic test turns on specific, external criteria, "which can be listed and analyzed." *North Coast Indus. v. Jason Maxwell, Inc.*, 972 F.2d 1031, 1034 (9th Cir. 1992). Ultimately, only protectable

---

Plaintiff seeks judicial notice of four facts. However, none of these facts is alleged in the complaint. Moreover, even if true, the facts do not provide a basis upon which the Court would deny Defendants' motion. Therefore, the Court denies Plaintiff's request. (Docket No. 38).

aspects of a work may be considered when determining whether infringement has occurred. *See Pasillas v. McDonald's Corp.*, 927 F.2d 440, 443 (9th Cir. 1991) (copyright holder cannot show substantial similarity of expression between standard elements); *Harper House, Inc. v. Thomas Nelson, Inc.*, 889 F.2d 197, 207-08 (9th Cir. 1989) (infringement decision cannot be based on unprotectable aspects of plaintiff's work). Under the extrinsic test, the Court defines the scope of copyright protection by "analytically dissecting" the alleged similarities between the works and separating protected elements of expression from unprotected ideas. *See Apple Computer,* 35 F.3d at 1443.

"Protectable expression includes the specific details of an author's rendering of ideas" while "scenes a faire, which flow naturally from generic plotlines, are not protectable." *Funky Films*, 462 F.3d at 1077. In *Funky Films*, the court examined the "plot, characters, themes, mood, pace, dialogue [and] sequence of events" in evaluating whether the defendant's television series was substantially similar to the plaintiff's screenplay. *Id.* at 1078; *see also Litchfield v. Spielberg*, 736 F.2d 1352, 1356 (9th Cir. 1984) ("The extrinsic test requires a comparison of plot, theme, dialogue, mood, setting, pace, and sequence.").

1. Plot

Both "Squisher the Fish" and "Finding Nemo"

begin with an egg hatching into a young fish.[2] However, that is one of the few ways in which the plots of the two stories are the same. In "Squisher the Fish," Squisher is hatched and then finds "a hole to call his very own." Pallios Decl., Ex. T at 1. "Finding Nemo" begins with Nemo's mother and father in a new home, excited that they are about to become parents. Roberts Decl., Ex. U.

After Squisher spends the night in his hole, he wakes up curious and hungry. Pallios Decl., Ex. T at 1. He is amazed by the many kinds of fish in the ocean. *Id.* Squisher introduces himself to a fish named Glen who tells him, "I'd love to help you out, just follow me along the way and we'll eat and sing and play, play, play." *Id.* Glen then sings Squisher a song that teaches him about many of the different creatures living in the sea. *Id.* at 2- 3. Glen also teaches Squisher about love. *Id.* at 3. After Glen teaches Squisher about the danger of humans, a diver swims above them. *Id.* Glen and Squisher hide in a moray eel's cave. *Id.* The eel tries to eat the two fish and chases them until they are able to hide in a tiny hole. *Id.*

Glen then brings Squisher to the reef cleaning

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[2]Plaintiff alleges that she submitted a different version of her story to Defendants than the version that she registered with the copyright office. Thomas Decl. ¶ 2. Plaintiff contends that the version she sent to Defendants includes a sentence about Squisher's parents guarding the egg from which he hatches. Thomas Decl., Ex. B. at 2. However, the version she registered did not include this sentence. Pallios Decl., Ex. T.

station, "a place where you can work and be safe, there's plenty to eat and many friends you can make." *Id.* at 4. At the cleaning station, Glen meets a fish named Mr. Grubbs who has a hole in his fin where a diver speared him. *Id.* Squisher also meets and falls in love with a fish named Dot. *Id.* at 4-5.

Squisher and Dot live together and are "a perfect match." *Id.* at 5. One day Squisher and Dot meet Glenn and Emily to search for a new place to play. *Id.* While the fish are playing hide and seek, a diver scoops Dot into a net. *Id.* at 7. She calls out for help and Squisher also gets caught in the net trying to save her. *Id.* The two fish are put in a boat and then put in a tank "[t]o be cared for by humans and protected from harm." *Id.* The story closes with Squisher "home at last" and "safe and happy to be protected from harm." *Id.* at 10. He is described as "the king of his world, in this public aquarium." *Id.*

While "Squisher the Fish" focuses on Squisher's discovery of the ocean and his eventual capture by divers, "Finding Nemo," as the title implies, focuses on Nemo's father Marlin's attempts to find Nemo after he is captured by divers. While Squisher's capture and placement in the aquarium is the culmination of his story, Nemo's capture is the catalyst for his father's adventures, which, together with Nemo's attempts to escape from the fish tank in a dentist's office, are the central plot of the story.

On the most general level, both stories deal with young fish in the ocean that are captured by divers and

put in a fish tank. However, courts have consistently held that such basic plot ideas are not protected by copyright law. *See, e.g., Cavalier v. Random House, Inc.*, 297 F.3d 815, 824 (9th Cir. 2002); *Berkic v. Crichton*, 761 F.2d 1289, 1293 (9th Cir. 1985).

In *Cavalier*, the Ninth Circuit noted that the parties' works shared "the general premise of a child, invited by a moon-type character, who takes a journey through the night sky and returns safely to bed to fall asleep." 297 F.3d at 824. However, the court held that "basic plot ideas, such as this one, are not protected by copyright law." *Id.* Similarly, in *Berkic*, the court noted,

> At a very high level of generality, the works do show a certain gruesome similarity. Both deal with criminal organizations that murder healthy young people, then remove and sell their vital organs to wealthy people in need of organ transplants. To some extent, both works take their general story from the adventures of a young professional who courageously investigates, and finally exposes, the criminal organization.

761 F.2d at 1293. However, the court held, "this degree of similarity between the basic plots of two works cannot sustain a plaintiff's claim that the works are 'substantially similar.'" *Id.* In fact, the court held, "No one can own the basic idea for a story" because "[g]eneral plot ideas are not protected by copyright

law." *Id.* Rather, such ideas "remain forever the common property of artistic mankind." *Id.*

2. Sequence

As described above, Nemo is captured early in "Finding Nemo" and the story revolves around his father's efforts to find him and Nemo's attempts to escape from the fish tank in a dentist's office. The climax of the story occurs when Nemo and his father are reunited. In contrast, Squisher spends the majority of the story exploring the sea, first with his friend Glen, then with his friend Mr. Grubbs and finally with Dot. The climax of Squisher's story is when he is captured and put in the fish tank only to discover that he is happy and safe there.

Plaintiff argues that, despite these differences in the overall storylines, Defendants have copied "the entirety of the fundamental essence and structure of" her work and "Nemo's story cannot begin or end without the Squisher story." Opposition at 8. Plaintiff cites *Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F.2d 354 (9th Cir. 1947), in support of her argument that she can sustain a claim even if the copied portion only constitutes a small portion of Defendants' work. The *Universal Pictures* court held, "The whole picture need not be copies to constitute infringement;" and, "The mere copying of a major sequence is sufficient." *Id.* at 361. However, in that case, the court found "57 consecutive scenes lifted almost bodily from the Lloyd product, not just the reproduction of an isolated single incident or event." *Id.* at 360. Such similarities do not

exist here. Further, although it is shorter, Plaintiff's work covers much more of the protagonist's life, hatching, falling in love and discovering that his blue dot is fading as he ages. In contrast, throughout the movie Nemo is a young fish whose father is searching for him.

Plaintiff also argues that specific events in "Finding Nemo" are copied from her story. However, as Defendants point out, Plaintiff's arguments are based on factual misrepresentations of the stories. A comparison of the sequence of events in the two works does not support a finding of substantial similarity.

3. Characters

Plaintiff argues that the title characters are both "curious inquisitive" and "cautioned . . . to be wary of dangers." Opposition at 8. However, a young character who is inquisitive and whose curiosity leads him or her into danger "can be considered a stock character." *Cavalier*, 297 F.3d at 825 (holding that a talking moon is a stock character in children's literature). Further, the fact that both Nemo and Squisher are talking fish "directly flows" from the idea of a young fish discovering the ocean. *See id.* (talking moon "directly flows from the idea of a journey through the night sky"). Moreover, Plaintiff's description of Squisher is not reflected in any of the physical characteristics of Nemo. Nemo is an orange clownfish with wide eyes and white stripes around his body. Squisher is initially described as a "tiny yellow fish." Roberts Decl., Ex. T. at 1. Later, it is disclosed that he

has a "blue circle" marking. *Id.* at 5.

Plaintiff also notes that Nemo has an injured fin, a characteristic that she argues Defendants copied from her character Mr. Grubbs. Plaintiff further argues that "Defendants like this characteristic so much they used it twice, having Gill, one of the aquarium fish in Nemo, suffer from the same injured fin." Opposition at 8. However, Plaintiff provides nothing to support her argument that an injury is a protectable characteristic and, as Defendants argue, there is no similarity among the injuries. Nemo's fin was deformed from a barracuda attack while he was still an egg; Gill's fin is also deformed but the film does not explain why; Mr. Grubbs' fin was injured when it was pierced by a diver's spear the day before he met Squisher.

Plaintiff's argument that other minor characters in "Finding Nemo" were copied from her story similarly fails. Although Squisher and Nemo's father both meet turtles, the presence of a sea turtle, as in "Finding Nemo," or a loggerhead turtle, as in "Squisher the Fish," can be said to "directly flow" from storylines taking place in the ocean. *See Cavalier*, 297 F. 3d at 825. Similarly, that Nemo and Squisher would each encounter another character that teaches him about things can reasonably be expected of a story in which a young fish is discovering the ocean. A comparison of the characters does not support a finding of substantial similarity.

4. Mood

Defendants also argue that the mood of the two works differs sufficiently to undermine a finding of substantial similarity.[3] Defendants argue that "Plaintiff's work does not have a mood" while "'Nemo's' mood is exciting and suspenseful." Reply at 8. Plaintiff characterizes the works differently, arguing that both works have a mood of a "happy, light children's tale" and of "wonderment for the ocean and its inhabitants." Opposition at 10. However, as Defendants argue, Nemo is in danger for much of the film, lending a suspenseful and potentially scary mood. A comparison of the moods of the two works does not support a finding of substantial similarity.

5. Setting

Both stories take place on a reef in the ocean and in a fish tank. However, this "naturally and necessarily flows from the basic plot premise," common to the two stories, of a fish captured from the ocean and put into a fish tank. *Cavalier*, 297 F.3d at 924. In

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[3]Defendants further argue that the pace of the works undermines a finding of similarity, noting that over the course of eleven pages, Squisher grows up and falls in love, while over the course of a feature-length film, "Nemo remains a boy." Reply at 8. However, it is virtually impossible to compare the pace of an eleven page story with that of a feature length film. *See Idema v. Dreamworks, Inc.*, 162 F. Supp. 2d 1129, 1185 (C.D. Cal. 2001) (noting the difficulty of such a comparison "between works which are captured in different media (written word versus film)").

Williams v. Crichton, the Ninth Circuit found that much more specific "common elements of electrified fences, automated tours, dinosaur nurseries, and uniformed workers were scenes-a-faire that flowed from the concept of a dinosaur zoo." 84 F.3d 581, 589 (9th Cir. 1996). The setting of these works does not support a finding of substantial similarity.

Thus, none of the factors weigh in favor of a finding of substantial similarity between "Squisher the Fish" and "Finding Nemo." Therefore, the Court finds that Plaintiff's copyright claim fails as a matter of law. Because this finding is based on the works themselves and not on Plaintiff's pleadings, leave to amend would be futile.

B. Time-Bar

Defendants also argue that, even if the works are substantially similar, Plaintiff's copyright infringement claim is time-barred. The parties agree that the statute of limitations for such claims is three years. 17 U.S.C. § 507. Plaintiff does not dispute that she first saw the film on June 6, 2003, almost four years before May 29, 2007, when she filed the original complaint in this case in California state court. However, Plaintiff contends that Defendants continued to show the film in public theaters after May 29, 2004, and that each "theatrical showing constitutes a new act of infringement." Opposition at 2. Further, Plaintiff contends that each sale of a DVD of the film or video game based on the film constitutes a separate act of infringement. *Id.*

In *Roley v. New World Pictures, LTD.*, the Ninth Circuit held, "A cause of action for copyright infringement accrues when one has knowledge of a violation or is chargeable with such knowledge." 19 F.3d 479, 481 (9th Cir. 1994) (citing *Wood v. Santa Barbara Chamber of Commerce, Inc.*, 507 F. Supp. 1128, 1135 (D. Nev. 1980)). In *Roley*, the plaintiff relied on a "rolling statute of limitations theory" to argue that "so long as any allegedly infringing conduct occurs within the three years preceding the filing of the action, the plaintiff may reach back and sue for damages or other relief for all allegedly infringing acts." *Id.* The Ninth Circuit rejected that theory but held, "In a case of continuing copyright infringement, an action may be brought for all acts that accrued within the three years preceding the filing of the suit." *Id.*

Citing *Roley*, the Ninth Circuit later held, in *Kourtis v. Cameron*, that a copyright infringement claim based on the release of the film "Terminator II" was time-barred because the plaintiffs alleged that they had learned of the infringement at the time of the release, which was more than three years prior to the date their complaint was filed. 419 F.3d 989, 999 (9th Cir. 2005). However, the *Kourtis* court noted that "the complaint also alleges several acts of continuing infringement, including the release of "Terminator II" on DVD and the use of the "Minotaur" materials to develop "Terminator III." *Id.* at 999-1000. Because the plaintiffs had not alleged the dates on which they discovered those acts of continuing infringement, the court held that "it cannot be concluded that the

Kourtises' claim is time-barred in its entirety." *Id.* at 1000. However, the court noted that the defendant could renew its statute of limitations arguments on summary judgment.

Similarly, Plaintiff concedes that she was aware of the alleged infringement based on Defendants' production of "Finding Nemo" as early as June 6, 2003, but has not alleged when she learned of the other acts of continuing infringement. Therefore, Plaintiff's infringement claim based on the initial production of the film is time-barred, but the Court cannot find that her claims based on the other acts of continuing infringement are barred.

Defendants cite *Polar Bear Productions, Inc. v. Timex Corp.*, 384 F.3d 700 (9th Cir. 2004), in support of their argument that even if Plaintiff did not know about the continuing acts, such as the release of the film on DVD and the related video games, merchandise and live performances until May, 2004, she should have. However, in *Polar Bear Productions*, the Ninth Circuit clearly held that "the date of discovery is an issue of fact." *Id.* at 707. Therefore, the Court finds only that Plaintiff's claims based on the original production and release of the film must be dismissed as time-barred.

III. California Business and Professions Code § 17200 Claim

Defendants argue that Plaintiff's § 17200 claim is preempted by the Copyright Act because the work

involved falls within the "subject matter" of the Copyright Act and the rights Plaintiff asserts under California law are "equivalent" to those protected by the Copyright Act. *Kodadek v. MTV Networks, Inc.*, 152 F.3d 1102, 1212 (9th Cir. 1998).

Plaintiff does not dispute that her story falls within the "subject matter" of the Copyright Act. However, she argues that her unfair competition claim is not equivalent to her copyright infringement claim because she has alleged a breach of confidence. Defendants counter that Plaintiff's breach of confidence allegations fail as a matter of law.

A breach of confidence claim requires a confidential relationship that arises when an idea is offered to another in confidence and is voluntarily accepted by the offeree in confidence. *Faris v. Enberg*, 97 Cal. App. 3d 309, 322-23 (1979). A plaintiff may raise an inference of a confidential relationship in a number of ways including through "proof that the material submitted was protected by reason of sufficient novelty and elaboration," or proof that she "offered the idea upon condition of confidence and a clear understanding that payment would be made upon use." *Id.* at 323 (internal citations and quotations omitted).

Plaintiff alleges that "Defendants knew or should have known that Plaintiff's story submission was in confidence." FAC ¶ 21. However, the cover letter Plaintiff sent to Defendants along with her story does not state that the manuscript is being offered in

confidence.[4] *See* Thomas Decl., Ex. A. The cover letter also fails to provide a clear basis from which to infer that Plaintiff expected payment if her story was used. The letter simply states, "I feel there is potential for this to be sold along with a cassette tape for young readers as it sounds good when read aloud" and "I certainly hope that we can work together as I believe that this is a book with great potential." *Id.* Neither of these statements supports an inference of a confidential relationship between Plaintiff and Defendants. Plaintiff also argues that her cover letter "communicat[ed] to Defendants that her story was original and novel." Opposition at 12. However, nothing in the letter supports such a finding.

Moreover, the cases Plaintiff cites in support of her argument do not support a finding of a confidential relationship. In *Faris*, the defendant Enberg agreed to meet with the plaintiff Faris to discuss Faris's idea for a sports show. 97 Cal. App. 3d at 314. At that meeting, Enberg requested and Faris gave him a copy of his registered format of the idea. *Id.* at 315. Faris told Enberg that "it was his 'creation' and 'literary property.'" *Id.* Further, Faris "discussed [his] show and Mr. Enberg's participation as a business proposal or offer." *Id.* Nevertheless, the California court held that

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[4]Because Plaintiff refers to this cover letter in her complaint, supplies a copy of the letter and does not allege any other communication between the parties, the Court may rely on the letter to dismiss her claim. Indeed, at the hearing Plaintiff's counsel confirmed that there was no other communication between the parties.

"no rational receiver of the communications from Faris could be bound to an understanding that a secret was being imparted." *Id.* The *Faris* court clearly stated, "We do not believe that the unsolicited submission of an idea to a potential employee or potential business partner, even if that person then passes the disclosed information to a competitor, presents a triable issue of fact for confidentiality." *Id.* This case does not support a finding of a confidential relationship where, as here, Plaintiff alleges that she submitted an unsolicited work to Defendants, which was then returned with a cover letter stating that Defendants do not accept such submissions.

While the California Court of Appeal found a confidential relationship in *Thompson v. California Brewing Company*, that case is clearly distinguishable from Plaintiff's. There, the plaintiff alleged that he submitted his "new and novel" idea "at defendants' special instance and request." 150 Cal. App. 2d 469, 472 (1957). Further, the plaintiff alleged that the defendants had "expressly and orally agreed to pay to plaintiff the reasonable value of such new and novel idea if and when the defendants, or any of them, used the same." *Id.* Although the letter by which the plaintiff disclosed his idea to the defendants did "not of itself indicate any element of confidence in the relationship," the court nonetheless found the allegations of a confidential relationship sufficient because the plaintiff "alleged the voluntary assumption of such a relationship by the defendants." *Id.* at 474. Further, the *Thompson* court relied on the fact that the defendants there were "looking for

'ideas.'" *Id.* at 475. Unlike the plaintiff in *Thompson*, Plaintiff here has no basis other than her letter to establish any such voluntary assumption.

Similarly, Plaintiff quotes dicta in *Davies v. Krasna*, where the California Court of Appeal quoted a law review article that stated that even when a traditional relationship giving rise to a confidential relationship does not exist, "courts will tend to find a confidential relationship when the parties deal on unequal terms resulting in one party reposing trust and confidence in the other's good faith." 245 Cal. App. 2d 535, 548 (1966) (quoting Nimmer, *The Law of Ideas*, 27 So. Cal. L. Rev. 119, 138-40 (1954)). However, there, as in Thompson, the court only found a confidential relationship where the plaintiff alleged the "voluntary assumption of such a relationship by the defendants." Id. (quoting *Thompson*, 150 Cal. App. 2d at 475).

California law clearly requires "understanding or voluntary acceptance of the confidential disclosure" on Defendants' part. *Tele-Count Eng'rs v. Pac. Tel. & Tel. Co.*, 168 Cal. App. 3d 455, 465 (1985). The content of Plaintiff's cover letter, together with Defendants' return of her submission without review belies any such understanding or acceptance.

Plaintiff has not adequately plead a confidential relationship. Therefore, her § 17200 claim is equivalent to her infringement claim and preempted by the Copyright Act. Further, Defendants' "knowledge of the confidential nature of information must precede its disclosure." *Id.* Unless Plaintiff could plead any

other communication between herself and Defendants that occurred prior to her submission of her story with the cover letter, there is no basis upon which such knowledge could be found. Plaintiff indicates that she cannot do so. Therefore, the Court dismisses with prejudice Plaintiff's § 17200 claim.

CONCLUSION

For the foregoing reasons, the Court GRANTS Defendants' motion to dismiss the FAC (Docket No. 32). Because amendment would be futile, the dismissal is with prejudice. The Clerk shall enter judgment in favor of Defendants and close the file. Each party shall bear its own costs.

IT IS SO ORDERED.

Dated: 2/14/08

/s/
CLAUDIA WILKEN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA

DEBORAH THOMAS,

Plaintiff, No. C 07-04392 CW

v. JUDGMENT

THE WALT DISNEY COMPANY, WALT DISNEY STUDIOS, DISNEY PRESS, PIXAR ANIMATION STUDIOS, WALT DISNEY FEATURE ANIMATION, WALT DISNEY PICTURES and DISNEY ENTERPRISES, INC.,

Defendants.

For the reasons set forth in this Court's Order Granting Defendants' Motion to Dismiss the First Amended Complaint,

IT IS ORDERED AND ADJUDGED

That Plaintiff Deborah Thomas take nothing, that the action be dismissed on the merits, and that each party bear its own costs of action.

Dated at Oakland, California, this 14th day of February, 2008.

RICHARD W. WIEKING
Clerk of Court

By: /s/
SHEILAH CAHILL
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[DATE STAMP]
FILED
SEP 28 2009
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

DEBORAH J. THOMAS,

Plaintiff - Appellant,

v.

THE WALT DISNEY COMPANY; et al.,

Defendants - Appellees.

No. 08-15602

D.C. No. 07-CV-04392-CW
Northern District of California,
Oakland

ORDER

Before: PAEZ, TALLMAN, and N.R. SMITH, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Thomas's petition for panel rehearing and petition for rehearing en banc are denied.

No further filings shall be accepted in this closed case.

Archie S. Robinson, Esq. [SBN 34789]
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ROBINSON & WOOD, INC.
227 North First Street
San Jose, CA 95113
Telephone: 408/298-7120
Facsimile: 408/298-0477

Attorneys for Plaintiff
DEBORAH J. THOMAS

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT' OF CALIFORNIA -
OAKLAND DIVISION

DEBORAH J. THOMAS
Plaintiff,

vs. No. CV 07-04392 CW

THE WALT DISNEY COMPANY, WALT DISNEY STUDIOS, DISNEY PRESS, PIXAR ANIMATION STUDIOS, WALT DISNEY FEATURE ANIMATION, WALT DISNEY PICTURES, DISNEY ENTERPRISES, INC. and DOES 1 through 100, Inclusive,
Defendants.

FIRST AMENDED COMPLAINT FOR DAMAGES AND INJUNCTION FOR COPYRIGHT INFRINGEMENT AND UNFAIR COMPETITION

JURY DEMAND

JURISDICTION AND VENUE

1. This is an action seeking damages and injunctive relief for copyright infringement under the Copyright Act, 17 U.S.C. §§ 101 et. seq., and for related claims of state unfair competition under the California Business & Professions Code § 17200 et seq.

2. This Court has subject matter jurisdiction over the federal questions pursuant to 17 U.S.C. § 501 and 28 U.S.C. §§ 1331 and 1338(a). The Court also has supplemental jurisdiction over plaintiffs claims arising under California Business & Professions Code §§ 17200 et seq pursuant to 28 U.S.C. § 1367, as those claims form part of the same case or controversy.

3. Venue is proper in this district under 28 U.S.C. §§ 1391 and 1400(a).

PARTIES

4. Plaintiff Deborah J. Thomas is a resident of the State of Florida.

5. Defendant THE WALT DISNEY COMPANY, is a corporation, licensed to do business in the State of California, and doing business in the County of Santa Clara.

6. Defendant WALT DISNEY STUDIOS, is a corporation, licensed to do business in the State of California, and doing business in the County of Santa Clara.

7. Defendant DISNEY PRESS, is a corporation, licensed to do business in the State of California, and doing business in the County of Santa Clara.

8. Defendant PIXAR ANIMATION STUDIOS, is a corporation, licensed to do business in the State of California, and doing business in the County of Santa Clara.

9. Defendant WALT DISNEY FEATURE ANIMATION, is a corporation, licensed to do business in the State of California, and doing business in the County of Santa Clara.

10. Defendant WALT DISNEY PICTURES, DISNEY ENTERPRISES, INC., is a corporation, licensed to do business in the State of California, and doing business in the County of Santa Clara.

11. The true names and capacities of Defendants who are sued herein as Does 1 through 100, inclusive, whether individual, associate, or otherwise, are unknown to Plaintiff at this time, and therefore, Plaintiff sues such fictitiously named Defendants by such fictitious names and capacities. Each of the Defendants designated herein by fictitious names is, in some manner, responsible for

the events and happenings referred to herein, and caused damage proximately and foreseeably thereby, whether such responsibility was negligent, intentional or otherwise. Plaintiffs will seek leave of this Court to amend this complaint with respect to the true names and capacities of such Defendants when such fictitiously named Defendants have been ascertained with reasonable certainty.

12. Upon information and belief, each of the Defendants was acting as the agent, servant and employee of the remaining Defendants and was acting within the course and scope of such agency and employment, with the knowledge, permission, and consent of each other and of the remaining Defendants, and for the benefit of all or one or more of the Defendants.

13. Upon information and belief, when the Defendants perpetrated some or all of the acts, conduct and omissions herein alleged, each of them individually, or through their authorized agents, servants, employees, or both, knew of such acts, conduct and omissions, and/or knowingly ratified, and/or knowingly participated in, and/or knowingly authorized, and/or knowingly acquiesced in, and/or aided or abetted, and/or knowingly accepted the benefits of the same. Upon information and belief, by reason of the foregoing, the Defendants are, and were, jointly and severally liable to Plaintiff for such damages suffered as alleged herein and are further jointly and severally liable to Plaintiff for any other appropriate relief requested and granted.

BACKGROUND FACTS

14. In the summer of 2000, Plaintiff created an original literary work entitled "Squisher the Fish." (hereinafter referred to as the "Subject Work").

15. The Subject Work contains material wholly original with Plaintiff that is copyrightable subject matter under the laws of the United States.

16. On or about April 27, 2004, Plaintiff applied to the Register of Copyrights for a Certificate of Registration for the Subject Work. The Certificate was issued by the Register of Copyrights on April 27, 2004, and bears registration number TXu1-175-008. A true and correct copy of this Certificate is attached hereto as Exhibit A.

17. Plaintiff is currently and at all relevant times has been the sole proprietor of all right, title, and interest in and to the copyright in the Subject Work.

18. On or about April 6, 2001, Plaintiff submitted said Subject Work to Defendants for the purpose of selling her work for use as a movie, published book, television show, game or other commercial application.

19. Plaintiff submitted her work to Defendants with the understanding that they would be in a position to determine how best to use her

story, and reposed confidence and trust in Defendants to deal fairly and honestly with her.

20. Plaintiff submitted her work with the understanding that the submission was confidential and Defendants would not use her Subject Work without her permission or without compensation.

21. Defendants knew or should have known that Plaintiff's story submission was in confidence and use of the story was conditioned upon Plaintiff's permission and compensation to Plaintiff.

22. Defendants kept and reviewed Plaintiff's Subject Work until approximately June 22, 2001.

23. On or about June 21, 2001, Defendants notified Plaintiff that it was their business practice to not consider outside story submissions.

24. Contrary to Defendants' representations, during the time Defendants had possession of Plaintiff's Subject Work, Defendants copied Plaintiff's Subject Work and incorporated it into a movie created, produced, distributed and sold by Defendants entitled "Finding Nemo."

25. At no time did Defendants obtain Plaintiff's authorization to use her story or provide any compensation to Plaintiff for the use of her story.

26. The movie, "Finding Nemo", was first released and shown to the public by Defendants on

May 30, 2003.

27. Plaintiff first saw the movie, "Finding Nemo" on June 6, 2003. Plaintiff at that point became aware that Defendants had copied her story, "Squisher the Fish" and had incorporated it into the movie.

28. On information or belief, Defendants continued the theatrical release of the movie "Finding Nemo" domestically and internationally after May 29, 2004.

29. Each showing of "Finding Nemo" in theaters constituted a separate act of infringement of Plaintiff's rights in her Subject Work.

30. On information or belief, Defendants released the movie, "Finding Nemo" on DVD and videocassette for sale and rental. On information and belief, sales and rentals of the DVD and videocassette of "Finding Nemo" continued after May 29, 2004. Each sale and rental of the DVD and videocassette of "Finding Nemo" constituted a separate act of infringement of Plaintiff's rights in her Subject Work.

31. On information or belief, sometime after May 30, 2003, Defendants prepared a video game based on the movie, "Finding Nemo." On information or belief, sales of the video game based on "Finding Nemo" continued after May 29, 2004. Each sale of the video game based on the movie, "Finding Nemo"

constituted a separate act of infringement of Plaintiff's rights in her Subject Work.

32. On information and belief, sometime after May 30, 2003, Defendants prepared children books based on the movie, "Finding Nemo." On information or belief, sales of such children books continued after May 29, 2004. Each sale of children books based on the movie, "Finding Nemo," constituted a separate act of infringement of Plaintiff's rights in her Subject Work.

33. On information and belief, Defendants have made toys and other merchandise based on the story and characters in the movie, "Finding Nemo." On information or belief, sales of such toys and other merchandise continued after May 29, 2004. Each such toy and other merchandise constitutes a separate act of infringement of Plaintiff's rights in her Subject Work.

34. On information and belief, Defendants have prepared live performances based on the movie, "Finding Nemo." On information or belief, such live performances continued after May 29, 2004. Each such live performance constituted a separate act of infringement of Plaintiff's rights in her Subject Work.

35. On information and belief, Plaintiff alleges that Defendants have received substantial revenues and profits from the showing of "Finding Nemo" in theaters, from the sale and rental of DVD and

cassette copies of the movie, "Finding Nemo," and from the sale of video games, toys and merchandise and live performances based on the movie.

36. Defendants have never given credit or payment to Plaintiff for the use of her Subject Work.

FIRST CAUSE OF ACTION
COPYRIGHT INFRINGEMENT
(17 U.S.C. § 101 et. seq.)

37. Plaintiff realleges each and every allegation set forth in Paragraphs 1 through 36, inclusive, and incorporates them herein by reference.

38. Through their conduct alleged herein, Defendants have infringed Plaintiff's copyright by reproducing, adapting, distributing and/or displaying the movie "Finding Nemo" and/or making and/or selling video games, books, toys and other merchandise based on the movie "Finding Nemo" which embodies Plaintiff's copyrighted material without authorization in violation of Sections 106 and 501 of the Copyright Act, 17 U.S.C. §§ 106 and 501.

39. Each infringement by Defendants, as alleged herein, in and to the Plaintiff's copyrighted material constitutes a separate and distinct act of infringement.

40. Defendants' acts of infringement were wilful in disregard of and with indifference to the

rights of Plaintiff.

41. As a direct and proximate result of the infringements by Defendants, and each of them, Plaintiff is entitled to damages and Defendants' profits in amounts to be proven at trial which are not currently ascertainable. If necessary, Plaintiff will seek leave to amend this complaint to state the full amount of such damages and profits when such amounts have been ascertained.

42. Plaintiff is further entitled to her attorneys' fees and full costs pursuant to 17 U.S.C. § 505.

43. As a direct and proximate result of the foregoing acts and conduct, Plaintiff has sustained and will continue to sustain substantial, immediate and irreparable injury, for which there is no adequate remedy at law. Plaintiff is informed and believes and on that basis alleges that unless enjoined and restrained by this Court, Defendants will continue to infringe Plaintiffs rights in the copyrighted material. Plaintiff is entitled to preliminary and permanent injunction pursuant to 17 U.S.C. § 502.

SECOND CAUSE OF ACTION CALIFORNIA STATE UNFAIR COMPETITION CLAIM (CALIFORNIA BUSINESS AND PROFESSIONS CODE § 17200 et. seq.)

44. Plaintiff hereby repleads and incorporates

by reference paragraphs 1 through 43 of the First Cause of Action as though the same were repeated at length herein.

45. By violating the confidence reasonably reposed in them by Plaintiff, without authorization or compensation, and by intentionally misrepresenting their intentions of using Plaintiff's copyrighted work, as aforesaid, Defendants, and each of them, engaged in and continue to engage in unlawful, unfair and/or fraudulent conduct in violation of California Business & Professions Code Section 17200.

46. Defendant have also engaged in and continue to engage in conduct that is deceptive, untrue and misleading in violation of California Business & Professions Code, Section 17500, which also constitutes a violation of Section 17200.

47. Defendants' unlawful, unfair and/or deceptive acts were wilful, in disregard of and with indifference to the rights of plaintiff.

48. As a direct and proximate result of Defendants' unlawful, unfair and/or deceptive acts and practices, Plaintiff has been deprived of credit and money to which Plaintiff would have otherwise been entitled. Plaintiff is entitled to restitution of such sums in an amount which is to be proven at trial and which is not currently ascertainable. If necessary, Plaintiff will seek leave to amend this complaint to state the full amount of such sums

when such amounts have been ascertained.

49. As a direct and proximate result of the foregoing acts and conducts, Plaintiff has sustained and will continue to sustain substantial, immediate and irreparable injury for which there is no adequate remedy at law. Plaintiff is informed and believes and on that basis alleges that unless enjoined or restrained by this Court, Defendants will continue to engage in conduct violative of California Business & Professions Code, Section 17200. Plaintiff is entitled to preliminary and permanent injunctive relief.

PRAYER FOR RELIEF

Wherefore, Plaintiff prays for judgment against Defendants as follows:

1. For Plaintiff's damages and Defendants' profits in such amount as may be found;

2. For a preliminary and a permanent injunction enjoining Defendants, and each of them, and their respective agents, employees, officers, successors, licensees and assigns, and all persons acting in concert or participation with each or any of them from directly or indirectly reproducing, adapting, distributing and/or displaying the movie "Finding Nemo" and/or making and/or selling video games, books, toys and other merchandise based on the move, "Finding Nemo," or otherwise infringing in any manner Plaintiff's copyright (whether now or existence or hereafter created);

3. For restitution;

4. For prejudgment interest according to law;

5. For Plaintiff's attorneys' fees and full costs incurred in this action;

6. For punitive damages; and

7. For such other and further relief as the Court may deem just and proper.

Dated: October 31, 2007

ROBINSON & WOOD, INC.

By /s/
ARCHIE S. ROBINSON
Attorneys for Plaintiff
DEBORAH J. THOMAS

JURY DEMAND

Demand for jury is hereby requested by Plaintiff.

Dated: October 31, 2007

ROBINSON & WOOD, INC.

By /s/
ARCHIE S. ROBINSON
Attorneys for Plaintiff
DEBORAH J. THOMAS

Certificate of Registration

[SEAL OF THE U.S. COPYRIGHT OFFICE]

This Certificate issued under the seal of the Copyright Office in accordance with title 17, United States Code, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

/s/ Marybeth Peters

Register of Copyrights, United States of America

Short Form TX
For a Nondramatic Literary Work
UNITED STATES COPYRIGHT OFFICE

REGISTRATION NUMBER
TXu1-175-008

Effective Date of Registration
4-27-04

Application [Illegible]
APR 27 2004

[Illegible]
One APR 27 2004 Two _____

1. Title of This Work:
Squisher the Fish

2. Name and Address of Author and Owner of the Copyright:

Deborah Thomas
514 4th Street
Port St. Joe, Florida 32456
Phone (850) 227-1763 Fax ( )
Email apalach500@hotmail.com

3. Year of Creation.

2000

4. *If work has been published,* Date and Nation of Publication.

a. Date _____ _____ _____
b. Nation

5. Type of Authorship in This Work (Check all that this author created.):

☒ Text (includes fiction, non-fiction, poetry, computer programs, etc.)

☐ Illustrations
☐ Photographs
☐ Compilation of terms or data

6. Signature (Registration cannot be completed without a signature):

I certify that the statements made by me on the application are correct to the best of my knowledge [Illegible footnote]. Check one:

☒ Author ☐ Authorized agent

X /s/ Deborah Thomas

7. Name and Address of Person to Contact for Rights and Permissions. Phone, fax, and email.

☒ Check here if same as #2 above
Phone ( ) Fax ( ) Email

8. [Illegible]

Name	Deborah Thomas
[Illegible]	514 4th Street
City/State/Zip	Port St. Joe, FL 32456

9. [Illegible]

Deposit Account #_____
Name _____

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Certified Copy

BEFORE THE HONORABLE CLAUDIA WILKEN, JUDGE

DEBORAH J. THOMAS,

PLAINTIFF,

VS. NO. C 07-4392CW

THE WALT DISNEY COMPANY, ET AL., PAGES 1 - 24

DEFENDANTS.

OAKLAND, CALIFORNIA
THURSDAY, JANUARY 31, 2008

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFF: ROBINSON & WOOD
227 NORTH FIRST STREET
SAN JOSE, CALIFORNIA 95113
BY: ARCHIE S. ROBINSON,
ATTORNEY AT LAW

FOR DEFENDANTS: QUINN EMANUEL URQUHART

OLIVER & HEDGES
555 TWIN DOLPHIN DRIVE,
SUITE 560
REDWOOD SHORES,
CALIFORNIA 94065-2139
BY: EVETTE D. PENNYPACKER
ANDREA PALLIOS ROBERTS
CLAUDE M. STERN,
ATTORNEYS AT LAW

REPORTED BY: RAYNEE H. MERCADO,
CSR NO. 8258

THURSDAY, JANUARY 31, 2008 2:09 P.M.

PROCEEDINGS

THE CLERK: CALLING THE MATTER OF THOMAS VERSUS THE WALT DISNEY COMPANY, CIVIL ACTION NO. C07-4392. COUNSEL, PLEASE COME FORWARD. STATE YOUR APPEARANCES FOR THE RECORD.

MS. PENNYPACKER: EVETTE PENNYPACKER FOR DEFENDANTS.

MR. STERN: CLAUDE STERN FOR THE DEFENDANTS.

MR. ROBINSON: ARCHIE ROBINSON FOR THE PLAINTIFF.

MS. ROBERTS: ANDREA PALLIOS

ROBERTS FOR THE DEFENDANTS.

THE COURT: GOOD AFTERNOON.

PLAINTIFF'S ATTORNEY CAN STAND OVER HERE BY THE PODIUM CLOSEST TO THE JURY BOX, AND WHOEVER'S ARGUING FOR DEFENDANTS CAN STAND BY THIS PODIUM.

WE HAVE DEFENDANTS' MOTION TO DISMISS.

GIVE ME ONE SECOND.

(PAUSE IN THE PROCEEDINGS.)

THE COURT: LET ME START BY SAYING THAT I HAVE A INCLINATION TO DISMISS FOR FAILURE TO -- OF THE WORKS TO BE SUBSTANTIALLY SIMILAR UNDER THE EXTRINSIC TEST. WE'LL COME BACK TO THAT, BUT THAT LEAVES ME WITH THE 17200 CLAIM, WHICH I HAVE SOME UNCERTAINTY ABOUT IF I -- IT CAN'T STAND AS IT IS. PERHAPS IT COULD BE AMENDED. IF IT WERE AMENDED, IT WOULD BE SIMPLY A STATE CLAIM, IN FEDERAL COURT WITH NO REMAINING FEDERAL CLAIM, AND I WOULD BE INCLINED TO DISMISS IT WITHOUT PREJUDICE TO BE

* * *

STATUTE OF LIMITATIONS. I THINK THE

STATUTE ON THE MOVIE ACCRUED THE FIRST TIME SHE SAW IT.

THE STATUTE ON THE DVD'S OCCURRED WHEN SHE KNEW THE DVD'S WERE RELEASED. BUT I DON'T THINK I COULD FIND ON A MOTION TO DISMISS WITHOUT ANY ALLEGATIONS WHEN SHE KNEW THAT THE FIRST DVD WAS RELEASED, AND, SIMILARLY, ALL THE OTHER DIFFERENT THINGS. THE ICE SHOW, THE -- WHATEVER ELSE. WE WOULD NEED TO KNOW WHEN THOSE HAPPENED AND WHEN SHE KNEW ABOUT THEM. AND SO, CONCEIVABLY, THE STATUTE MIGHT NOT HAVE RUN ON SOME OF THOSE THINGS.

SO, COUNSEL, YOU CAN ADDRESS THE SUBSTANTIAL SIMILARITY ISSUE AND ALSO TELL ME WHAT YOU'D WANT TO DO WITH YOUR 17200 CLAIM IN THE EVENT THE COPYRIGHT CLAIM GOES.

MR. ROBINSON: THANK YOU, YOUR HONOR.

WITH RESPECT TO SUBSTANTIAL SIMILARITY, WE BELIEVE THAT THERE IS NO "FINDING NEMO" WITHOUT THE STORY "SQUISHER THE FISH." IT IS TRUE THAT THE MOVIE HAS A LOT MORE IN IT THAN THE RELATIVELY SHORT STORY OF THE PLAINTIFF'S. HOWEVER, IT CANNOT BE SAID THAT THERE IS NOT SUBSTANTIAL

SIMILARITY BETWEEN THE MOVIE AND THE STORY WHEN YOU CONSIDER THAT BOTH BEGIN WITH HATCHLINGS GUARDED BY PARENTS.

THE COURT: WELL, THAT RAISES A LITTLE BIT OF A PROBLEM WHICH I DIDN'T MENTION WITH RESPECT TO THE DISPARITY BETWEEN THE VERSION THAT WAS SENT TO THE DEFENDANT AND THE VERSION THAT'S ACTUALLY COPYRIGHTED. THE VERSION THAT'S

* * *

MS. PENNYPACKER: DOES THE COURT -- WOULD THE COURT LIKE FURTHER COMMENT ON SUBSTANTIAL SIMILARITY? I DON'T WANT TO BELABOR A POINT THAT YOU'VE ALREADY --

THE COURT: NOT REALLY. OH, IF YOU CAN SING ME RAY'S SONG, THAT WOULD BE USEFUL, OR TELL ME THE WORDS.

MS. PENNYPACKER: SO RAY'S SONG -- AND I'VE SEEN THE MOVIE ABOUT A THOUSAND TIMES.

THE COURT: DID RAY SING IT, OR IS IT BACKGROUND MUSIC AS YOU SAY?

MS. PENNYPACKER: SO RAY IS SINGING THE SONG -- SO RAY HAS A BUNCH OF THE

LITTLE CHILDREN FISH ON HIS BACK, AND HE'S SWIMMING ALONG, AND HE'S POINTING -- I DON'T KNOW IF HE'S SINGING HIS SONG OR HE'S REPEATING -- STATING IN SINGSONG KIND OF MANNER -- POINTING OUT DIFFERENT SPECIES IN THE OCEAN. AND I CAN'T REALLY MAKE OUT ALL THE WORDS, AND WE WOULD BE HAPPY TO GET OUR CLIENT -- I WOULD HAVE TO GO TO THE CLIENT TO HAVE --

THE COURT: JUST WHAT'S THE GIST OF IT? WHAT IS HE SORT OF SAYING?

MS. PENNYPACKER: HE'S POINTING OUT --

THE COURT: NAMING THE NAMES OF SPECIES? OR SINGING A LITTLE DITTY ABOUT THEM OR --

MS. PENNYPACKER: HE'S JUST NAMING THE NAMES IN A SINGSONG FASHION, AND HE'S USING THE LATIN TERMS, WHICH IS WHY I CAN'T REPEAT THEM EASILY FOR YOU AT THE MOMENT.

THE COURT: BUT IS IT IN A SONG LIKE THE -- I'VE

* * *

SOMEBODY WHO'S CARE-TAKING FOR THEM AND KEEPING THEM SAFE, AND -- SO THERE'S

A BIG DIFFERENCE BETWEEN THOSE TWO ELEMENTS.

AND THE CHASE SCENES THAT WERE REFERENCED ARE ALSO QUITE DIFFERENT. IF YOUR HONOR RECALLS IN "FINDING NEMO," THERE'S A -- A CHASE SCENE THAT DERIVES FROM DOREE AND MARLIN GOING TO VISIT THE 12-STEP SHARK PROGRAM WHERE THE SHARKS ARE TRYING TO NOT EAT FISH. AND THEN ONE OF THE SHARKS TAKES A WHIFF OF BLOOD FROM DOREE, AND THEY GO OFF ON THIS CHASE. AND THEY -- THEY ARE IN AN UNDERGROUND -- I MEAN, A -- A SHIPWRECK WHERE THERE AREA LOT OF BOMBS, AND SO THEY'RE SWIMMING THROUGH THESE BOMBS AND THEY GO INTO A HOLE AND THEN THEY PUSH OUT A BOMB TO GET THE SHARKS TO GO AWAY FROM THEM. AND THEY END UP SETTING OFF ALL THESE OTHER BOMBS THAT ARE GOING OFF.

THERE'S NOTHING EQUIVALENT TO THAT SORT OF HIGH-RISK AND INTENSE CHASE SCENE IN "SQUISHER THE FISH." THEY HIDE IN A LITTLE HOLE WHILE SOME OTHER ANIMALS THAT ARE NOT SHARKS GO BY, AND THEN THEY'RE SAFE. SO I DON'T THINK THOSE CHASE SCENES ARE SUBSTANTIALLY SIMILAR AT ALL. AND THE FACT THAT THERE'S A CHASE SCENE IN AN UNDERWATER ADVENTURE IS NOT GROUNDS FOR FINDING SUBSTANTIAL SIMILARITY BETWEEN WORKS.

THE COURT: OKAY. ANYTHING ELSE?

MR. ROBINSON: WITH RESPECT TO SUBSTANTIAL SIMILARITY, IT IS NOT JUST THE SPECIES SONG THAT IS THE ELEMENT THAT WE'RE RELYING ON FOR SUBSTANTIAL SIMILARITY. THAT IS ONE KEY ELEMENT, BUT THERE ARE MANY, MANY OTHERS.

THE CASE LAW SAYS THAT THERE CAN BE HUGE DIFFERENCES BETWEEN THE TWO WORKS AND STILL BE SUBSTANTIAL SIMILARITY. THE CASES WE CITED, THE *HAROLD LLOYD* CASE WHERE ONLY 20 PERCENT OF THE ENTIRE FILM OR JUST ONE SEQUENCE WAS SIMILAR; THE *IOWA STATE UNIVERSITY RESEARCH FOUNDATION VS. ABC* CASE IN WHICH ONE 12-SECOND SEGMENT AND ONE 2-AND-A-HALF-MINUTE SEGMENT WERE SUFFICIENT TO FIND SUBSTANTIAL SIMILARITY.

THE -- THE FACT THAT THERE ARE SO MANY SEPARATE INDICIA OF SIMILARITY INDICATES THAT THERE HAS TO HAVE BEEN A COPYING. YOU JUST DON'T THINK UP A "FINDING NEMO" WITH ALL OF THOSE ELEMENTS WITHOUT HAVING COPIED THE -- A STORY THAT CONTAINS ALL OF THOSE ELEMENTS. WITHOUT THE "SQUISHER" STORY, THERE IS NO "FINDING NEMO," AND I -- I CAN'T SAY MORE THAN THAT ON THE SUBSTANTIAL SIMILARITY.

WITH RESPECT TO THE UNFAIR COMPETITION, THERE IS CASE LAW THAT WE CITED THAT SAYS THAT THE QUESTION IS DID THE DEFENDANT KNOW OR SHOULD THE DEFENDANT HAVE KNOWN UNDER CIRCUMSTANCES -- THAT'S THE *THOMPSON* CASE. THE *FARIS* CASE, CITED WITH APPROVAL IN A CASE THAT THEY RELY ON, SAYS IT CAN BE INFERRED. THE *TELE-COUNT* CASE THAT THEY RELY UPON WAS A CASE THAT WAS ABOUT THE TASK OF LOOKING AT AN -- A JURY INSTRUCTION. AND THERE IS SOME DICTA THAT TALKS ABOUT THE *THOMPSON* FORMULATION, BUT THAT IS PURELY DICTA BECAUSE IT WASN'T NECESSARY TO THE HOLDING IN THE *TELE-COUNT* CASE.

FINALLY, IN THE *ANDERSON* CASE, THE -- THE FACT THAT

* * *

[ABC STUDIOS LETTERHEAD]

Memorandum

To: ABS Studios Term Deal Executive Producers

Date: June 24, 2008

From: Howard M. Davinc

Extension: 0050

Subject: **Foreign Formats**

As I'm sure you're all aware, foreign formats have increased in popularity as the basis for US television development and production. What is often overlooked, or not fully appreciated are the complexities associated with negotiating format deals, coupled with the fact that often-times what is appealing in the format may be nothing more than a general underlying premise, which, in and of itself, may be no reason to license the underlying property.

There are a multitude of business reasons to carefully scrutinize entering into a transaction based on an underlying format. The most common are:

(a) The format rightsholders will typically seek executive producer credit and a degree of creative control/involvement, typically to be rendered from a foreign location, adding

perhaps an unnecessary layer to the creative process.

(b) Between format rights fees and executive producer fees, there are significant costs added to your production budget that will impact what you can put on the screen.

(c) A large chunk of the backend will go to the format rightsholder.

(d) Depending on the stature of the underlying property or the stature of the rightsholder, we may find ourselves freezing or being unable to acquire rights that limit our abilities to fully develop and exploit derivative uses of your show – be it on stage, as a feature, or in format sales of our own US production.

(e) Deals regularly get bogged down or sometimes break down entirely on issues relating to our ability to sell the US series without restriction internationally and issues relating to the desire of the foreign rightsholder to sell episodes of their underlying series in the US market. Here, it is not a symmetrical two-way street. Whereas the economics of producing a foreign series are not dependent on a vibrant US marketplace for the product, the economics of US network production do indeed depend on our ability to sell our series internationally without restriction.

I am aware that quite often you are first exposed to the idea of creating a project based on a property developed in a foreign country by your agents who send you submission material to review. The purpose of this communication is to ask your cooperation in the following manner:

1. Do not accept any submission based on a foreign TV property (be it a script, pilot or series episodes) without first discussing the nature of the property with ABCS Creative Affairs. I would like us to make our own independent evaluation whether the license of the property is necessary or appropriate.

2. If you on your own have come across an existing foreign TV project that you feel is something you'd like to explore adapting for the US market, again, please first discuss the opportunity with ABCS Creative Affairs to give us the same opportunity to independently evaluate whether a license of the underlying property is warranted.

Let me assure you that we continue to be actively, competitively and aggressively engaged in developing product based on foreign formats and our decision whether or not to get into negotiations will be premised purely on creative need and our legal analysis as to whether underlying rights are required.

Please feel free to contact me if you'd like to discuss this matter in greater detail.

§101

A work is "created" when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.

A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revision, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work".

* * *

§ 102. Subject matter of copyright: In general.

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

(1) literary works;
(2) musical works, including any accompanying words;
(3) dramatic works, including any accompanying music;
(4) pantomimes and choreographic works;
(5) pictorial, graphic, and sculptural works;
(6) motion pictures and other audiovisual works;
(7) sound recordings; and
(8) architectural works. [footnote omitted]

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

* * *

§ 103. Subject matter of copyright: Compilations and derivative works.

(a) The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.

(b) The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.

§ 104. Subject matter of copyright: National origin.

(a) Unpublished works. The works specified by sections 102 and 103, while unpublished, are subject to protection under this title without regard to the nationality or domicile of the author.

* * *

§ 106. Exclusive rights in copyrighted works.

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

* * *

§ 204. Execution of transfers of copyright ownership.

(a) A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent.

* * *

§ 504. Remedies for infringement: Damages and profits.

(a) In general. Except as otherwise provided by this title, and infringer of copyright is liable for either –

(1) the copyright owner's actual damages and any additional profits of the infringer, as provided by subsection (b); or

(2) statutory damages, as provided by subsection (c).

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